Risk Management of Off-Duty Employment

The headline from the Los Angeles Daily Journal gave one hundred and two million reasons for regulating off-duty jobs for law enforcement officers. The paper announced that the Los Angeles Police Department was liable for $102,000,000.00 to the family of a man shot by an off-duty officer working a private security job. Fortunately for the LAPD, that astronomical (at least by non-southern California standards) verdict was later overturned on appeal, after hundreds and hundreds of billable attorney hours. There is no shortage of lawsuits stemming from officers' off-duty jobs where the agency paid large sums in damages, or at least paid out huge sums for attorneys fees, in addition to the significant internal costs of defending a lawsuit. The easy answer is to bar all off-duty work, and pay officers a salary that makes such an approach feasible. And then there is the counter argument: reality.

Off-duty employment is a critical supplement to many officers' family budgets. The Iowa Supreme Court noted "regrettably, exemplary service as an officer does not necessarily, or even often, call for exemplary pay." In Tucson, Arizona, estimates of off-duty income top $2,000,000.00 annually for the city police department. Proponents of off-duty work claim that the agency receives a significant benefit from off-duty officers available for service calls that would take on-duty officers away from other work. When officers are working in a private security capacity at the sports event or concert, trouble may well be averted, or at the very least quelled before calling on-duty officers away from patrol duties. Road construction traffic control by off-duty officers is becoming increasingly common, and poses an obvious boon to traffic safety and crash reduction.

Should an agency decide to take the draconian approach and ban all off-duty employment, it would find past court decisions in its favor. The handful of decisions to consider the question have uniformly ruled that an officer has no constitutional right to any secondary employment while employed as a sworn law enforcement officer. On the other side of the coin, at least one state, New York, preempted complete local control over off-duty employment by giving officers statutory rights to secondary jobs, with certain allowable local restrictions. However, the safe ground of due process is not the only constitutional muster to pass. An agency must also show that employment restrictions do not violate equal protection provisions.

For the vast majority of agencies that permit, and even facilitate, off-duty work, certain restrictions are commonly imposed. Frequently, employment in sexually-oriented businesses, bars and taverns, and private investigative firms are either severely restricted or banned. The International Chiefs of Police Association recommends prohibiting off-duty employment at any establishment that sells pornography,

liquor, sex toys, or where gambling occurs. The motivation is evident in the opportunity for discrediting the department as well as the potential for abuse of law enforcement resources and confidential information. The Detroit Police Department received national attention when claims surfaced that female police officers from the 12th precinct were moonlighting as strippers. Two of the nation's largest municipal police agencies, New York Police Department and Washington, D.C. Metro Police Department, are barred by city ordinance from off-duty work by their officers in bars and strip clubs. Officers may also be placed in conflicting circumstances when they observe a violation by guests, clients, or employees of their off-duty employers, or by the employers themselves. The pressure will be implicit, but potentially strong, to look the other way.

One category of potential off-duty employers – bars and taverns – presents persuasive arguments both for and against allowing officers to work in security or bouncer positions. If officers are present at the drinking hole, there is a visible motivation for patrons to behave. That was the motivator behind a New York City Councilman pushing for a change in city law prohibiting off-duty employment where liquor is served. On the other hand, if the officer notices that a guest of the bartender seems a year shy of the legal drinking age, will this violation be deemed minor, and disregarded?

Many of the off-duty shootings that end in litigation involve officers working security at drinking establishments. A Birmingham, Alabama police officer was working off-duty, in full police uniform, when a patron asked for an escort to his car. The patron was accompanied by a number of young teenagers who had been drinking with him. The bar had a reputation for overlooking underage drinking, despite the presence of off-duty city police officers. As the officer walked the patron to the front door, a crowd of fifteen or more who had been arguing inside the bar followed the patron. At the door, the officer told the youths that they could not fight inside the bar, but he would do nothing about what happened on the street. The patron was chased down and beaten to death by the mob. A jury held the city liable for $1,600,00.00.

Though the city attempted to raise substantive immunity against private violent acts as a defense, and claimed that the officer was not acting as a police officer at the time of the fatal thrashing, the court ruled that the officer acted as a city employee. Because the department had rules governing off-duty work in bars, and because the officer had followed those rules, the city was deemed to have control over the officer's actions and thereby was liable for his gross misfeasance. The officer was fired following an internal affairs investigation confirmed his unambiguously derelict performance. The police department would have been on solid ground to completely ban off-duty jobs in bars. If the department had established and enforced a policy addressing off-duty powers of arrest and intervention in emergencies, such as that promoted by the International Association of Chiefs of Police recommends, the disaster might well have been avoided. Though many agencies have such prohibitions, court challenges have been infrequent, and the agency is the regular victor.

The City of Birmingham court considered cases from several other jurisdictions that had reached opposite results, finding that the general rule of the law enforcement agency's liability centers on whether the agency had control over the officer's actions in the off-duty employment situation. Other cases have reinforced this concept, and considered whether the off-duty officers were in department uniform, and acting under department rules at the time of the harmful event.

The decision in the City of Birmingham case could have easily been predicted. No jury is likely to sympathize with an officer who does nothing when an angry mob follows a minor, with obvious intent to fight or beat the grossly outnumbered victim. It certainly did not help matters that the victim and his young friends had been allowed to drink at the bar in front of the officer. Equally predictable was the revulsion expressed by the Supreme Court of Alabama as the police department tried to escape liability. The decision teaches that departments allowing officers to work off-duty in drinking establishments must insist that the officer strictly adhere to the law and department policies. Both the officer and the off-duty employer must know that the agency expects the officer to perform as if on-duty.

Another danger zone for off-duty work is the realm of private investigator. Officers challenging bans on private eye work often raise constitutional issues of right to contract, property interest in employment, and due process. The agency need only show a rational basis for the regulation to prevail. Avoiding the potential conflict of interest is a sufficient justification to exclude private investigative work from the list of approved secondary jobs. There is also the risk of criminal action against the officer for misappropriation of confidential information, or misuse of law enforcement databases.

One case noted a peculiar conflict of interest. An officer took an off-duty investigative job working for a plaintiff's attorney and was assigned to investigate alleged civil rights violations by officers of the neighboring police department. The matter came to light when the chief of the targeted department called the officer's own police chief. The investigator became the investigated, and it became evident that he had gained access to records that would not have been available to non-police personnel. He was terminated for failure to obtain permission to work off-duty. He sued and lost. In contesting his termination, the officer argued that off-duty jobs were often posted at the department, and no permission was required to accept those jobs. The court found no difficulty in distinguishing between traffic control at the high school football game and investigating fellow law enforcement officers. The department could legitimately relax the rules for less sensitive off-duty jobs without abandoning its right to hold officers to the stricter standard in appropriate circumstances.

Whether an agency chooses a total ban on off-duty work, or prohibits only secondary employment in particular categories, the agency's task is merely to advance a legitimate interest in regulating the off-duty work. In addition to the many cases upholding restrictions on employment in the private security, bar and tavern, and private investigative realms, as potential conflicts of interest, courts have recognized the agency's interests in "reducing mental and physical fatigue, limiting litigation, and lessening liability insurance expenses" as legitimate bases for restrictions. Promotion of department loyalty, avoiding scheduling problems, and promoting department efficiency have also been cited as judicially recognized legitimate reasons to restrict off-duty jobs.

What about those circumstances when "off-duty" moves to "on-duty" in a single moment? For example, an officer hired to direct traffic, or guard the cash box at the ticket window, sees a person known to be the subject of a felony arrest warrant. No on-duty officer being immediately available, the officer attempts an arrest. A scuffle ensues, and the warrant suspect is shot. Who is potentially liable?

Considering first civil rights liability, which carries the litigation incentive of attorney fees, the primary inquiry is whether the officer acted under color of law. Once the officer is found to have acted under color of law, an entire host of claims, such as failure to train, negligent hiring, negligent supervision and retention, are likely to tag along. Courts quickly bypass the question of uniform, badge, and marked patrol car to look at whether the act related to a police duty. Acting under color of law includes an officer acting under the pretense of color of law. An officer who claims the color of law in furthering the officer's or the secondary employer's interests will likely be held to have acted under color of law. An action as simple as flashing a badge or stating that one is a law enforcement officer can trigger a finding of acting under color of law.

An agency's policy about taking off-duty action, whether on a second job or otherwise, should consider that courts have found off-duty officers to be acting under color of law when, first, the officer performs a law enforcement duty, or second, when the officer pretends to act under official authority. Display or use of a weapon is a common theme in cases where courts have found off-duty officers to be acting under color of law. Policies should restrict officers from taking official action where no health or substantial property interest is at stake.

Liability may also arise under traditional agency or master and servant legal principles. An agency who calls on an off-duty officer to assist will undoubtedly be liable for the officer's action, but what about the officer who takes action by his or her own initiative? That issue arose in the case of an off-duty officer working as a security guard in a retail store. The officer saw a person who he believed to the subject of an arrest warrant for misdemeanor disorderly conduct. He verified the warrant with a phone call and

informed his off-duty employer. The off-duty employer urged the officer to apprehend the suspect, who by now had left the premises. The off-duty officer followed the suspect to the suspect's home, calling for on-duty backup en route. When the officers arrived at the suspect's home, the suspect told the officers that he had locked himself in and would not come out. The off-duty officer left the scene and shortly returned. Officers secured a key to the front door and found the suspect locked in the bathroom. One officer kicked in the door and shot the suspect in the stomach.

In the lawsuit that followed, the court determined that the off-duty officer could be the servant, or employee, of both the drug store and the police department at the same time. As long as the off-duty officer's actions were consistent with the duties performed for both employers, both might be considered responsible for the actions of the off-duty officer. The secondary employer would not be jointly liable, leaving only the deep pocket of the police department, only if the off-duty officer's actions were wholly outside the scope of the private employment. Where the store manager encouraged the arrest of the suspect, the company could be held liable.

Under either general theory, agency common law or civil rights statutes, an agency allowing off-duty work where the duties are directly related to law enforcement duties should consider an approach where the agency participates in the contracting and supervising of the off-duty employment. Such an approach is consistent with the model policy on off-duty employment promulgated by the International Association of Chiefs of Police (IACP). The IACP has developed a series of policies addressing off-duty issues, such as employment and off-duty arrest powers that are available to guide individual departments to formulate their own policies.

Additional Off-Duty Employment Considerations

An agency's legal authority to control off-duty employment is just one of a myriad of complex and perilous legal issues associated with off-duty employment. Although this article is limited to illustrating the agency's legal control over the types of off-duty work, other vital issues include:

• Scope of Control. Whether the agency will require all off-duty employment involving the use of law enforcement skills and authority to be scheduled through department channels? If this approach is followed, the agency can easily require solid indemnity agreements and third party liability insurance, worker compensation policies, and exercise considerable control over the working conditions. If officers are free to contract for their own secondary jobs, what level of control will the agency have over the

working conditions and likelihood that arrest powers and other law enforcement authority will be exercised off-duty?

• Worker Compensation. If the officer is injured on an off-duty related to law enforcement, it is probable that the agency's carrier will receive a claim. The officer also runs the risk of being deemed an "independent contractor" of the off-duty employer and having no coverage, particularly for injuries not directly related to law enforcement actions. The secondary employer is likely to argue that the employer had no control over how the officer secured the premises, and thus is a true independent contractor. A few courts reject this argument and find both the law enforcement employer and the secondary employer as "joint employers."

• Fair Labor Standards Act. The agency must be careful to define off-duty employment arranged through the agency as non-overtime for purposes of the FLSA, or risk the liquidated damages provision and other penalties of the FLSA. The employment must be purely at the officer's option, and truly separate and independent from the officer's normal duties. Consider whether the off-duty work will have an impact on scheduling, potentially increasing overtime costs for the agency.

• Tired Cops. Economic conditions across the nation have dictated small or no pay increases for officers in the past few years. Indeed, many have lost ground in the face of increasing insurance costs and inflation. Cops' families have the same needs as other families and countless officers resort to off-duty employment just to meet the bills, not to secure luxuries. Obviously, an officer who worked the midnight shift protecting the private property of the local convenience store is less fit to work the patrol division day shift than the officer who had a solid eight hours sleep. The International Association of Chiefs of Police recommends that off-duty jobs be restricted to twenty-four hours per calendar week.

• Equipment and vehicle wear. Agencies allowing officers to use patrol vehicles and other equipment should consider a charge to recover depreciation and damage costs.

• Conflicting loyalties. The agency needs to determine whether vacation or compensatory time may be taken to allow an officer to work off-duty employment.

• Experience. Most off-duty employers just want a cop. The employer may not care or know how much experience the officer has on the job. An agency can certainly argue that an officer should at least be off

probation before being placed in a situation of making critical decisions without the availability of a senior officer or field supervisor.

• Training. Will the agency provide training on off-duty response to emergencies? Will the agency train officers to carry restraints, and in the concealment and deployment of off-duty weapons?

• Communications and Backup. Will the off-duty officer be allowed to use a department radio or police channel so that backup is more readily available? What of the risk that the officer will use information resources for private purposes, subjecting both the officer and the department to discipline?

• Fairness. If an established clique within the agency controls the high-paying off-duty jobs, resentment is likely to spill over to on-duty relations within the agency.

• Competition. Local security companies may well resent the competition and complain that a law enforcement agency competes unfairly by virtue of the officers' authority, ability to wear department uniforms and drive department cars, and connections with business owners. One group of private security providers launched an anti-trust lawsuit against law enforcement officials who facilitated private security details for their officers. Although the suit was generally unsuccessful, the court did allow the action to proceed against the chief and the sheriff in their personal capacities.

Conclusion

Law enforcement is a risk management minefield. Nonetheless, a risk that can be predicted can often be prevented, transferred, or mitigated. Knowing the legal and practical limits on controlling the off-duty activities and secondary employment of law enforcement officers leads to a lawful and sensible policy. In turn, a reasonable policy, coupled with fair enforcement, will help administrators avoid the headaches of off-duty disasters.

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